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No. 02-1297

IN THE
Supreme Court of the United States

SIGNATURE PROPERTIES INTERNATIONAL, LIMITED PARTNERSHIP,

Petitioner,

v.

CITY OF EDMOND, OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

This case presents nothing new to this Court which it has not so recently determined in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Both the trial court and the Tenth Circuit applied extant precedent by this Court faithfully in reaching the clearly compelled finding that it lacked jurisdiction to render the relief requested by Petitioner, that the case was not ripe for adjudication, and that Petitioner should pursue such remedies as state and local law allow it.

In *Pacific Gas & Electric Co. v. State Energy Resources & Development Commission*, 461 U.S. 190, 200 (1983) this Court noted that the basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies form judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." This case exemplifies the wisdom of this rationale in Art. III jurisprudence.

Petitioner comes before this Court having never applied for the building permits it claims Respondent denied him, having never appealed a denial through the municipal agencies instituted for that purpose, and having never sought relief under either Oklahoma's general civil process or her inverse condemnation procedures. In short, as both lower courts have ruled, Petitioner comes into the federal judicial system without any actual case or controversy for adjudication.

STATEMENT OF CASE

The property known as Oak Tree in Edmond, Oklahoma is a planned unit development ("PUD"). The property consists of existing housing, two golf courses, a country club, and property yet to be developed. Development has occurred in phases, an approach not uncommon nationwide. Various developers and owners have developed the property during the course of its history. All plans for development, including that of Petitioner, have announced compliance with Ordinance 737, which declares, *inter alia,* that nothing precludes the City of Edmond from imposing additional requirements for improvement as they are recognized in the course of more detailed planning or as technical standards and ordinances change.

The sanitary sewer system at Oak Tree consisted of lift stations, a system requiring more safety access features and maintenance, which made it more costly and less desirable for the City, which planned to implement a gravity based system. This plan began in 1985 with a study done by the engineering firm of MGR-SMC. Contrary to assertions made by Signature, this was a comprehensive study, not an I & I study for Oak Tree. The long-range plan contemplated the elimination of as many lift stations as possible.

Signature's engineer, Bryan Coon, announced in 1995 that the sewer system Lift Station # 1 would routinely overflow if all platted lots were occupied. City Manager Leonard Smith received a letter from Signature Director of Development Bob Bode advising that design and construction of the sewer upgrade would begin upon the issuance of the 95th building permit following November 1, 1995. Additionally, upon the issuance of the 195th building permit

for new home construction, Signature would finalize the design and commence construction of the new force main and upgrade Lift Station #4. Jerry Smith, Assistant City Manager, wrote back and stated that the City would accept this proposal provide Signature would replace Lift Station #1 or the force main sooner, should they reach capacity prior to the number of permits referenced above. Bode accepted this by return letter.

Through 1996-1998, Signature continued its development at Oak Tree. In January 1999, the City approved development for a portion of Oak Tree known as The Legacy conditioned upon reaching a solution to the sewer problem in 60 days. With Bode gone, Signature now repudiated his agreement. Absent a sewer solution, the City required its staff to come up with an allocation system for the remaining building permits. In 1998, City Manager Martin stated the City's expectation that Signature would honor the Bode commitment. At this time, Signature repudiated Bode's authority. The trial court ultimately determined the agreement not binding on Signature. This portion of the judgment below has not been appealed.

By the Fall of 1998, building everywhere had slowed. Historical statistics indicated the City could safely issue 21 more building permits without overtaxing the sewer system. These were available on a "first come/first served" basis. Neither Signature nor any builder affiliated with it applied. The City then instituted a moratorium from February 1999-August 1999 to determine how many homes could safely be built without fear of frequent overflows at Lift Station #1. An engineer retained by the City reported that additional capacity beyond the 21 permits existed, but an exact number could not be determined.

In August of 1999, building permits again became freely available. From that date, to time of trial in July 2000, Signature did not apply for a single permit. No one applying during that period received a denial. No evidence at trial indicated that anyone on behalf of Signature either appealed a permit denial to the City Counsel or took action under Oklahoma's constitutional and statutory inverse condemnation procedures. (*See* Okla. Const. art. II, Sec. 23; 27 OS Sec. 1, *et seq.)* At trial, Signature presented no evidence of any purchase or building contracts canceled due to the sewer problems, no direct evidence of sales lost due to sewer capacity concerns, and no limitations imposed on property usage. In short, insofar as a "taking" goes, Signature lost nothing not attributable to market forces and competition.

To this writer's knowledge, Signature has still not applied for, much less been denied, a single building permit.

PROPOSITION I

THE TRIAL AND APPELLATE COURTS' RULINGS ON RIPENESS WERE CLEARLY CORRECT

Both the trial court and the Tenth Circuit deemed this case unripe for the purposes of adjudicating the merits of Signature's Takings claims. Signature never received a building permit because Signature never applied for one. As a matter of course one cannot be denied that which one does not seek. Some suggestion arises from Signature's Petition that it feels entitled to advance notice by the City as to permit availability. In effect, Signature's main complaint appears to stem from the fact that the City of Edmond had the temerity to treat it like any other builder or developer: If you'd like a permit, you apply for one. If you do not apply

for one, you do not get one. If you do apply, perhaps one will issue; perhaps not. But you never know the "ifs" and "whys" of that possible denial until you try. Signature never did.

Signature justifies its lack of effort on its own behalf with a cry of "futility." Citing this Court's opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), it claims that the City, by its conduct, gave Signature reason to believe in the futility of the application process which local law provided. *Palazzolo* does not support Signature's position. Contrasted against the record established for this Court by Mr. Palazzolo, Signature's appears a pale and bloodless theory. Mr. Palazzolo did everything he could to obtain a building permit from government officials operating a statutory regime which pronounced any potential plan of development dead on arrival. Signature did nothing.

This Court's precedents concerning the futility exception to the ripeness doctrine has not specified in great detail the quantum of evidence required to establish futility. However, that case law, as well as the plain meaning of the word "futile," lead to a conclusion that futile does not equate to "more likely than not." The common meaning of the word "futile" is "serving no useful purpose: INEFFECTIVE, FRUITLESS." *Webster's Third New Int'l Dictionary* 925 (unabridged edition 1993). "Futility" is defined as "an abortive attempt or useless gesture." *Id.*

Palazzolo held that "federal ripeness rules do not require the submission of further and futile applications with other agencies." 533 U.S. at 626. Further examination of the facts of that case sheds light on what this Court meant by "futile." Anthony Palazzolo owned property which state law declared protected wetland on which filling was prohibited. 533 U.S.

at 614. There existed an exception only if a "compelling public purpose" would be served by the filling. *Id.* A state agency denied the landowner's proposed use, finding that it did not satisfy the "compelling public purpose" standard. In rejecting the board's argument that the landowner's claim was not ripe because he had not submitted applications for other types of development on the land, this Court stated:

> On the wetlands there can be no fill for any ordinary land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point.

Id. at 621.

Further applications under those circumstances would have been futile because the state law in question allowed for only one exception, for a "compelling public purpose," and the board already had determined that that exception did not apply. Thus, "futile" in *Palazzolo*, meant "serving no useful purpose." *Webster's* at 925.

Let us compare *Palazzolo* to *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), in which a developer tried to develop a residential subdivision for which its predecessor had received a preliminary approval. 473 U.S. at 177. Over the next few years, parts of the proposed development were given final approval and built. *Id.* at 178. In light of mistakes discovered in the original preliminary approval, the local government asked the developer to submit

a revised preliminary plat. The local government rejected the revised plat on the ground that it did not comply with various ordinances and regulations. *Id.* Page 302 at 180-81. The developer then brought an action pursuant to 42 U.S.C. § 1983, alleging a taking without just compensation.

This Court ruled the developer's claim unripe, noting:

> [R]espondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that *variances could have been granted* to resolve at least five of the Commission's eight objections to the plat.

Williamson, 473 U.S. at 188 (emphasis added). It rejected the contention that denial of approval of the plat "was equivalent to a denial of variances." *Id.* It noted that the regulations in question clearly stated that "any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat." *Id.* at 189. This Court concluded:

> Thus, in the face of respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted.

Id. at 190. *Williamson* resulted in no finding of "futility" because it appeared to the Court that "variances *could* have been granted" that would have allowed the development to

occur. 473 U.S. at 188. The Court did not speculate on whether it was "more likely than not" that such variances *would* be granted. *See also Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, 740, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997) (regulatory taking claim was ripe where "little or no uncertainty" remained as to the value of the petitioner's "transferable development rights"); *MacDonald, Somers & Frates v. County of Yolo*, 477 U.S. 340, 352, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986) (taking claim was not ripe where there was "le[ft] open the possibility that some development will be permitted").

In sum, while this Court has never precisely quantified futility, it has found it where development required filling but, under the laws, there could be "no fill for any likely or foreseeable use," *Palazzolo*, 533 U.S. at 622, and where there was "little or no uncertainty" as to the value of certain development rights, *Suitum*, 520 U.S. at 740; but *not* where there was left open "the possibility of some development," *MacDonald*, 477 U.S. at 352; or where "variances could have been granted" that might have permitted development, *Williamson Planning Commission*, 473 U.S. at 188. *See also Gilbert v. Cambridge*, 932 F.2d 51, 61 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991) ("[t]o come within the exception, a sort of inevitability is required: the prospect of refusal must be certain (or nearly so).").

These holdings lead inexorably to the conclusion that, where there remains an unexplored *possibility* under the regulations in question that development can occur, a claim is not ripe and the "futility" exception will not apply unless the party claiming futility can show that there was very little likelihood—or no likelihood—that the development would have been approved had that party taken further steps to

obtain approval. This Court articulated the logic of the ripeness requirement in *MacDonald, supra*, 477 U.S. at 348 when it reasoned that

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.

The litany of "nevers" in this case clearly led both Judge Cauthron at trial and the Tenth Circuit on appeal to the same conclusion. Signature never experienced a physical taking. Signature never applied for a permit. The City never denied or expressed an intention to deny Signature a permit if it applied for one. Signature never pursued an inverse condemnation action as available under Oklahoma law. Therefore, signature never presented any court, including this one, with a justiciable controversy. Therefore, certiorari should be denied.

PROPOSITION II

THE LOWER COURTS WERE CLEARLY CORRECT WHEN THEY FOUND NO TAKING

Signature bases its contention that a taking occurred on two premises. First, it argues, a taking occurred when the City instituted a six month moratorium while it studied the sewer situation. Next, of course, it alleges that the failure of the City to grant permits for which it never applied denied Signature its reasonable investment-backed expectation.

As a subpoint, it appears that Signature finds even the prospect of limited development a breach of its Constitutional rights since such a limitation, of necessity, falls short of allowing Signature to develop as it would.

As to the moratorium, established precedent establishes beyond peradventure that such temporary takings do not provide the basis for a compensable, if even actionable, claim. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), this Court last visited the issue of temporary takings. In *Tahoe-Sierra*, the court held that moratoriums, totaling 32 months, on development in the Lake Tahoe Basin did not constitute a compensable taking although the moratoriums temporarily deprived affected landowners of all economically viable use of their property. In doing so, this Court rejected both a per se rule which declared all moratoria compensable takings, as well as a narrower rule establishing parameters beyond which a taking would occur. At the heart of that case lay the following observations:

> In rejecting petitioners' per se rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.
>
> A narrower rule that excluded the normal delays associated with processing permits, or that covered only delays of more than a year, would certainly have a less severe impact on prevailing practices, but it would still impose serious financial constraints on the planning process. Unlike the "extraordinary circumstance" in which

> the government deprives a property owner of all economic use, *Lucas*, 505 U.S., at 1017, moratoria like Ordinance 81-5 and Resolution 83-21 are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria, or "interim development controls" as they are often called, are an essential tool of successful development. Yet even the weak version of petitioners' categorical rule would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values.
>
> The interest in facilitating informed decision-making by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether. To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.

535 U.S. at 337-339. Mr Justice Stevens then observed "We would create a perverse system of incentives were we to hold that landowners must wait for a takings claim to ripen so that planners can make well-reasoned decisions while, at the

same time, holding that those planners must compensate landowners for the delay." Signature's position here smacks of such perversity.

Moving beyond the moratorium, Signature still failed, as a matter of law, to present a sufficient case for a more global taking claim.

When a taking is absolute, *i.e.*, when the owner is deprived of any economically viable use of his property, no further inquiry is necessary. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999), the Ninth Circuit held, and this Court approved, of the traditional formulation that: "[W]here an owner is denied only some economically viable uses, a taking still may have occurred where government action has a sufficient economic impact and interferes with distinct investment-backed expectations." *Id.* In determining whether the owner has been deprived of any economically viable use, "[t]he standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all or substantially all economically viable use of his land." *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072-73 (11th Cir. 1996). The trial court had before it evidence, albeit disputed by Signature, that, if credited, established that Signature's property could be used for some single-family residences and that building permits for some residences would most likely have been available.

Signature maintains that such use of the property would not provide it sufficient financial return to return a profit in light of the significant investment into the property. However, the fact that Signature could be left without a profit from

such use of his land, due to its own decision not to make application for a building permit available on the same first-come-first served basis as any other developer, does not and cannot mean that it has lost all economically viable use of the property. If a property owner could insist on his chosen use of the property at issue as the standard by which possible economically viable use must be measured, the standard would have little or no objective value.

To establish an unconstitutional deprivation of property without due process of law, it is insufficient for plaintiff to show only that the regulation deprives him of the best use of his property or that the regulation has caused a severe decrease in the value of the property. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 592, 594 (1962). Rather, a plaintiff must show that the regulation interferes so severely with his use of the property as to render the property worthless or useless. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922); *Donohoe Construction Co., Inc. v. Montgomery County Council,* 567 F.2d 603, 608 & n.13 (4th Cir. 1977), *cert denied*, 438 U.S. 905 (1978); *Steel Hill Development, Inc. v. Town of Sanbornton,* 469 F.2d 956, 963 (1st Cir. 1972); *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*, 400 F. Supp. 1369, 1383 (D. Md. 1975). Accord *Williamson, supra*; *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124 (1978).

The interference with Signature's property interests, to the extent the City caused any at all, do not rise to the level of substantiality giving rise to a compensable taking under the precedent above. Like covetous neighbors in old Salem Village who uttered cries of "witchery" as a balm upon their own ill fortune thus creating an opportunity to acquire the neighbor's property in the bargain, Signature cries "taking"

in the same voice, in an effort to assuage the vicissitudes of market forces, competition, and its own inaction at the expense of the City of Edmond.

PROPOSITION III

SIGNATURE CLEARLY HAD NO VIABLE CLAIM FOR SUBSTANTIVE DUE PROCESS VIOLATIONS

Signature's substantive due process claims have, if anything, less substance than his takings or procedural due process claims. Still they must be addressed as they arise in the context of this action.

The propriety of the Tenth Circuit's disposition of the substantive due process claim finds illustration in comparison with *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000). In *Forseth*, various landowners brought suit against the Village of Sussex alleging violations of their constitutional rights when the Village wrongfully interfered with their land development. The Forseths, who sought to develop their newly purchased thirty acres of land in the Village, needed the approval of the Village Board to continue the proposed development. The Village Board, however, was led by a Village president who happened to own land abutting the Forseth's land and who greatly objected to the development efforts on the Forseth property. The Village Board ultimately agreed to a reduced development plan for the Forseth property, but only on the condition that the Forseth's convey a 1.85 acre buffer strip of land to the Village president.

The Forseth's then filed suit claiming, *inter alia*, that their substantive due process rights had been violated by the

forced conveyance of land for the personal gain of the Village president. In addressing the Forseth's substantive due process claim, the Seventh Circuit noted that substantive due process has "its greatest appeal when the state acts outside its eminent domain powers, for example by taking property for a private rather than for a public use." *Forseth*, 199 F.3d at 369 (quoting *Gamble v. Eau Claire County*, 5 F.3d 285, 286 (7th Cir. 1993)). But the court cited with approval its decision in *Covington Court. Ltd. v. Village of Oak Brook*, 77 F.3d 177 (7th Cir. 1996), in which it held that "even where a state takes pro rather than a public use, on takings and *due process claims* a plaintiff first must show that it has availed itself of state court remedies." *Forseth*, 199 F.3d at 369-370 (internal citations omitted, emphasis supplied). The court concluded that, despite the "troubling facts and allegations" of official misconduct, the Forseth's "labelled" substantive due process claim falls within the framework for takings claims" and is subject to Williamson's requirement that they first pursue and exhaust their state court remedies. *Id.* at 370 (internal citations omitted).

Signature's allegation of substantive due process violation centers around the allegedly improper moratorium and limitation upon building permits in the Oak Tree area. These have the ultimate effect of depriving plaintiffs of profit. lndeed, plaintiffs' primary requested remedy for this and other counts is an injunction preventing the City form enforcing its permit limitation, requiring specific remedial action on the sewer system, and damages for profits allegedly lost while lots lay idle. These allegations, serious as charges yet insubstantial in proof, do not rise to a level of misconduct that exceeds that found in *Covington* and *Forseth*. In both of those cases, substantive due process claims centered on

official misconduct were still found to be based upon the takings rubric and subject to the *Williamson* ripeness requirement.

It is clear that Signature's efforts in this case focused exclusively upon gleaning profits for idle land, gaining freedom from permit limitations, and the establishment of a constitutional right to the sewer of one's choice. The other allegations clearly play second fiddle to these overriding concerns. As such, the substantive due process count is only a thinly disguised takings claim. Because the labeled substantive due process claim falls within the framework of a takings claim, the claim remains subject to the unfulfilled ripeness requirement.

CONCLUSION

For all these reasons, certiorari should be denied.

Respectfully submitted,

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